

No. 20724

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACRON INVESTMENTS, INC., VELTURON CORPORATION,
METRIM CORPORATION, FULLERTON COUNTRY CLUB,
C. S. JONES, EDITH B. JONES, LOS COYOTES COUNTRY
CLUB, BELLEHURST COUNTRY CLUB, KENNETH G.
WALKER and NANCY M. WALKER,

Appellants,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,

Appellee.

Appeal From the District Court for the Southern District
of California, Central Division.

Reply Brief of Appellants. Acron Investments, Inc.,
Velturon Corporation, Metrim Corporation, Fullerton Country Club, C. S. Jones, Edith B. Jones, Los Coyotes Country Club and Bellehurst Country Club.

BALL, HUNT & HART,
JOSEPH A. BALL,
JOSEPH D. MULLENDER, JR.,
120 Linden Avenue,
Long Beach, Calif. 90802,

Attorneys for Appellants, Acron Investments, Inc., Velturon Corporation, Metrim Corporation, Fullerton Country Club, C. S. Jones, Edith B. Jones, Los Coyotes Country Club and Bellehurst Country Club.

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1. The Federal Savings and Loan Insurance Corporation
Is Not in "Independent Establishment."

28 USCA 451, which defines the agencies of government, within the meaning of 28 USCA 1345, provides:

"The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United

States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.”

Appellee Federal Savings and Loan Insurance Corporation (sometimes hereinafter “The Corporation”) says that since the various types of agencies are described in the disjunctive, a government entity or instrumentality can qualify as an agency for jurisdictional purposes if it fits within any one of the definitions listed. The fact that it is a corporation and the government does not have a proprietary interest, as required by §451, is immaterial if it fits one of the other definitions. (App. Br. 6-10.) The Corporation then argues that it does fit one of the other definitions because it is an “independent establishment”. (App. Br. 10-11.)

We will assume, for the purpose of replying to this argument, that a corporate agency could, in a proper case, also be an “independent establishment” within the meaning of §451. However, this does not solve the problem in this case. The fact is that Federal Savings and Loan Insurance Corporation is not an independent establishment. The only authority cited by the Corporation for the proposition that it is an independent establishment is 12 USCA 1437(b), which provides:

“The Home Loan Bank Board which was, pursuant to Reorganization Plan Numbered 3 of 1947, established and made a constituent agency of the Housing and Home Finance Agency shall, from August 11, 1955, cease to be such a constituent

agency and shall be an independent agency (including the Federal Savings and Loan Insurance Corporation) in the executive branch of the Government. . . .”

This statute does not say that the Federal Savings and Loan Insurance Corporation is an independent establishment. It says that the Federal Home Loan Bank Board is an independent agency and that the Federal Savings and Loan Insurance Corporation is included within that agency. It is the Federal Home Loan Bank Board which is independent, not the Insurance Corporation. The fact is that the Insurance Corporation has always been subject to the Home Loan Bank Board. The United States Government Organization Manual lists the Federal Home Loan Bank Board as an independent agency. The Federal Savings and Loan Insurance Corporation is not listed as an independent agency. It is a subdivision or part of the Federal Home Loan Bank Board. (United States Court. Org. Manual, 1965-1966 Ed. pp. 406-409.) A copy of the portion of the Organization Manual pertaining to the Federal Home Loan Bank Board and its subsidiary agencies, including the Federal Savings and Loan Insurance Corporation, is attached hereto as an Appendix. In addition, the Appendix of Manual gives the following history of the Federal Savings and Loan Insurance Corporation showing that it has always been controlled by the Federal Home Loan Bank Board and is not independent of it:

“Federal Savings and Loan Insurance Corporation.—Created by National Housing Act, approved June 27, 1934 (48 Stat. 1246; 12 U.S.C. 1724-1730), to insure safety of savings in thrift and home-financing institutions. Operated under a

board of trustees composed of the five members of Federal Home Loan Bank Board. Grouped with other agencies to form Federal Loan Agency by Reorg. Plan I, effective July 1, 1939. Transferred to Federal Home Loan Bank Administration under National Housing Agency by EO 9070 of Feb. 24, 1942. Board of Trustees abolished by Reorg. Plan 3 and functions transferred to Home Loan Bank Board (see Federal Home Loan Bank Board, test) under Housing and Home Finance Agency, effective July 27, 1947." (United States Government Organization Manual, 1965-66 Ed., Appendix, p. 660.)

The Federal Home Loan Bank Board could argue that it is an "independent establishment" of government, and it probably is. But the same cannot be said of the Federal Savings and Loan Insurance Corporation. The Corporation is subject to the direction and control of the Board. It is not independent in any sense of the word.

2. The Government Does Not Have a "Proprietary Interest" in the Federal Savings and Loan Insurance Corporation.

The Corporation has not replied to the authorities cited in our brief which hold that a proprietary interest in a corporation means ownership of stock in the corporation. (*Rotenberg v. Sheehan* (D.C.E.D. Mo. 1943), 48 F. Supp. 584, 586; *Select Theatres Corp. v. Johnson* (D.C.S.D.N.Y. 1956), 145 F. Supp. 583, 592.) Instead The Corporation claims, without citation of any authority, that since the government has control it has a proprietary interest. (App. Br. 11-16.) No one would

deny that the government (through the Federal Home Loan Bank Board) controls the Federal Savings and Loan Insurance Corporation. But to say that this is a proprietary interest says entirely too much. All corporations are controlled by the government to some extent. As one example, a corporation engaged in the pharmaceutical business is strictly regulated by the Food and Drug Administration. It is likely that even greater governmental control of business will be exercised in the future. An example of this is the automobile industry. It is almost a certainty that mandatory automobile safety legislation will be enacted within the immediate future. If control of a corporation is the test of the government's proprietary interest, then why stop with the Federal Savings and Loan Insurance Corporation? Every corporation is controlled by government. If control is to be the standard, then every corporation is an agency of government. The words "proprietary interest" cannot be given that broad a meaning. They should be given their usual and normal meaning. A proprietary interest is the interest of an owner. (Webster's 3rd New International Dictionary; *Colbert v. Ricker* (1943), 314 Mass. 138, 140 [49 N.E. 2d 459].) A proprietary interest in a corporation is ownership of stock of the corporation. (*Rotenberg v. Sheehan* (D.C. Ed. Mo. 1943), 48 F. Supp. 584, 586; *Select Theatres Corp. v. Johnson* (D.C. S.D.N.Y. 1956), 145 F. Supp. 583, 592.)

The Reviser's Notes do not require the broad interpretation of the statute advocated by the Federal Savings and Loan Insurance Corporation. The Notes say: "The phrase 'corporation in which the United States has a proprietary interest' is intended to include those

governmental corporations in which stock is not actually issued, as well as those in which stock is owned by the United States.” The Federal Savings and Loan Insurance Corporation does not fit in either category. The United States does not own any of its stock, and it is not a corporation in which stock has not been actually issued. To the contrary, the Federal Savings and Loan Insurance Corporation is a corporation in which \$100 million dollars worth of stock has actually been issued. (12 USCA 1725(b).)

There are government corporations in which stock has not and cannot be issued. For example, the Naval Sea Cadet Corps is a corporation created by Congress to cooperate with the Department of the Navy to interest American boys in seamanship. (36 USCA 1041, *et seq.*) The statute creating this corporation provides that it “shall have no power to issue any shares of stock or to declare or to pay dividends”. The non-stock corporations referred to at page 16 of the Appellee’s Brief are in the same category. The statutes creating the Federal Prison Industries, Incorporated, the Saint Lawrence Seaway Development Corporation and the Virgin Islands Corporation do not provide for issuance of stock, and presumably none has been issued. (18 USCA 4121, *et seq.*; 33 USCA 981, *et seq.*; 48 USCA 1407, *et seq.*) It may be that Congress (or the Reviser) had this type of government corporation in mind in saying that a proprietary interest in a corporation includes a government corporation in which no stock is actually issued. The fact remains that the Federal Savings and Loan Insurance Corporation is not such a corporation. The government does not have a proprietary interest in the Federal Savings and Loan

Insurance Corporation according to the usual and accepted definition of the word.

A further distinction between the Federal Savings and Loan Insurance Corporation and the non-stock corporations is that the government actually has a property interest in the non-stock companies. All money received by the Federal Prison Industries, Incorporated, must be deposited in the Treasury, and its expenses are paid by the Treasury. (18 USCA 4126.) The activities of the Saint Lawrence Seaway Corporation are financed by bonds purchased by the Treasury. (33 USCA 985.) All of the property of the Virgin Islands Corporation was acquired from the United States. (48 USCA 1407i.) By contrast, the Federal Savings and Loan Insurance Corporation is not operated with government funds. Originally it was in that the United States purchased its stock. However, that situation has long since changed. The Federal Savings and Loan Insurance Corporation derives its revenue from the insurance premiums paid by the savings and loan associations. The government's investment in the Insurance Corporation has been entirely paid off out of those funds.

3. 28 USCA 451 Does Contain a Complete List of Agencies Within the Meaning of Section 1345.

The Corporation argues that since §451 uses the word "include" in defining agencies, the list of agencies therein enumerated is not exclusive and does not preclude other governmental entities from being agencies for jurisdictional purposes. (App. Br. 16-21.) Admittedly the word "include" can be a term of enlargement as well as one of limitation. (*United States v. Gertz* (9th Cir. 1957), 249 F. 2d 662, 666.) But

the usual meaning is that of limitation. (*Montello Salt Co. v. Utah* (1911), 221 U.S. 452, 461-466 [31 Sup. Ct. 706, 55 L. Ed. 810]; *Blankenship v. Western Union* (4th Cir. 1947), 161 F. 2d 168, 169.) As the Supreme Court said in the *Montello Salt Co.* case:

“The court also considered that the word ‘including’ was used as a word of enlargement, the learned court being of opinion that such was its ordinary sense. With this we cannot concur. It is its exceptional sense, as the dictionaries and cases indicate.” (221 U.S. at 466.)

The word “include”, as used in 28 USCA 451, must be interpreted as a word of limitation. The full text of §451 is as follows:

“§451 Definitions

As used in this title:

The term ‘court of the United States’ includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the district courts of the United States for the districts of Hawaii and Puerto Rico, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

“The terms ‘district court’ and ‘district court of the United States’ mean the courts constituted by chapter 5 of this title.

“The term ‘judge of the United States’ includes judges of the courts of appeals, district courts, Court of Claims, Court of Customs and Patent Appeals, Customs Court and any court created by

Act of Congress, the judges of which are entitled to hold office during good behavior.

“The term ‘justice of the United States’ includes the Chief Justice of the United States and the associate justices of the Supreme Court.

“The term ‘district’ and ‘judicial district’ mean the districts enumerated in Chapter 5 of this title.

“The term ‘department’ means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

“The term ‘agency’ includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.”

The word “include” is used in defining many terms in addition to agencies: “The term ‘court of the United States’ includes . . .”; “The term ‘judge of the United States’ includes . . .”; “The term ‘justice of the United States’ includes . . .”. Surely no one would argue that when Congress has said that “The term ‘justice of the United States’ includes the Chief Justice of the United States and the associate justices of the Supreme Court,” that it meant to say that those were not the only “justices of the United States” and that any other judge of a United States court could be deemed a “justice of the United States”. Such an interpretation would be absurd when the immediately preceding paragraph defines the judges of the other United States

courts as “judges of the United States”. The word “include” is clearly and unmistakably intended to mean that it is a word of limitation listing and defining all of the positions which are “justices of the United States” and all of the positions which are “judges of the United States”. The same word “include” is used in defining “agency”. Being a part of the same statute, it must be given the same interpretation. It is a word of limitation listing and defining all of the types of government entities which may be considered an agency for jurisdictional purposes.

The Federal Savings and Loan Insurance Corporation is not among the types listed. It is a government controlled corporation, but the government does not have a proprietary interest. It is not a corporation in which the government owns stock, and it is not a corporation in which no stock has ever been issued. It is an insurance company supported entirely by insurance premiums paid by the savings and loan associations.

Respectfully submitted,

BALL, HUNT & HART,

JOSEPH A. BALL,

JOSEPH D. MULLENDER, JR.,

Attorneys for Appellants Acron Investments, Inc., Velturon Corporation, Metrim Corporation, Fullerton Country Club, C. S. Jones, Edith B. Jones, Los Coyotes Country Club and Bellehurst Country Club.

APPENDIX.

(Portions of pages 406-409 of the United States Government Organization Manual, 1965-66 edition, pertaining to the Federal Home Loan Bank Board.)

FEDERAL HOME LOAN BANK BOARD

101 Indiana Avenue NW., Washington, D.C., 20552.

Phone. DUdley 6-3157

Chairman	John E. Horne.
Member	Michael Greenebaum.
Member	John deLaittre.
Administrative Assistant to the Chairman	Robert N. Reeves.
Executive Assistant to the Chairman and Director, Office of Administration	Simon H. Trevas.
Secretary to the Board	Harry W. Caulsen.
General Counsel	Kenneth E. Scott.
Director of Audits	William B. Martin.
Office of Administration:	
Comptroller, Comptrol- ler's Division	Robert F. Quigley.
Director, Administrative Services Division	Charles M. Dulin.
Director, Operating Anal- ysis Division (Data Processing)	James C. Byrnes.
Chief, Organization and Methods Division	Richard E. Griebenow.
Director, Division of Fed- eral Home Loan Bank	

Operations	Lyndon R. Day.
Director, Division of Regulations	John M. Wyman.
Director, Office of Applications	Clarence S. Smith.
Director, Division of Personnel	Frank G. Healey.
Director, Office of Examinations and Supervision	Nathaniel L. Armistead.
Deputy Director	Lawrence M. Walters.
Director, Office of Research and Home Finance	Harry S. Schwartz.
Director, Office of Information	Clifford W. Patton.
Budget Officer	Thaddeus Corcoran.
Executive Secretary, Federal Savings and Loan Advisory Council	John J. Brady.
Secretary to the Chairman	Jeanne F. Burleson.
Federal Savings and Loan Insurance Corporation	
Director, FSLIC	Jerry D. Worthy.
Assistant Director	John A. O'Brien.

Federal Savings and Loan Advisory Council
Members

Appointed by the Board:

Eugene M. Mortlock (New York, N.Y.).
George E. Leonard (Phoenix, Ariz.).
Guy L. Reed (Denver, Colo.).
Samuel W. Hawley (Bridgeport, Conn.).
Perry E. Willits (Washington, D.C.).
Jack W. Cashin (Austin, Tex.).

Elected by the Banks:

Boston—Joseph T. Benedict (Worcester, Mass.).

New York—Edward W. Kozlik (Huntington, L.I., N.Y.).

Pittsburgh—Francis E. McGill (Philadelphia, Pa.).

Greensboro—J. M. Croson (Orlando, Fla.).

Cincinnati—William S. Guthrie (Columbus, Ohio).

Indianapolis—Robert J. Hutton (Detroit, Mich.).

Chicago—Al C. Steinhauer (Madison, Wis.).

Des Moines—Russel S. Cather (Springfield, Mo.).

Little Rock: J. Harry Jeanes (Waco, Tex.).

Topeka—Robert G. Lake (Pratt, Kans.).

San Francisco—F. Marion Donahoe (San Francisco, Calif.).

Spokane — Harold C. Kean (Seattle, Wash.).

[For regulations codified under Federal Home Loan Bank Board, see Code of Federal Regulations, Title 12, Chapter V].

Creation.—The Federal Home Loan Bank Board was made an independent agency in the Executive branch under section 109 (a) (3) of the Housing Amendments of 1955 (69 Stat. 640; 12 U. S. C. 1437). Under this law the name of the Home Loan Bank Board was changed to the Federal Home Loan Bank Board. Prior to this legislation the Board was a constituent agency of the Housing and Home Finance Agency under Reorganization Plan 3 of 1947, effective July 27, 1947. Pursuant to the Plan the Board assumed the functions of the previous Federal Home Loan Bank Board, the Board of Directors of the Home Owners' Loan Corporation (since dissolved), the Board of Trustees of the Federal Savings and Loan Insurance Corporation, and

of any members of any of these boards. However, certain executive and administrative functions were transferred to the Chairman of the Federal Home Loan Bank Board by Reorganization Plan 6 of 1961, effective August 12, 1961 (75 Stat. 838.)

The activities under control of the Federal Home Loan Bank Board are provided for in the Federal Home Loan Bank Act, approved July 22, 1932 (47 Stat. 725; 12 U. S. C. 1421, et seq.); the Home Owners' Loan Act of 1933, approved June 13, 1933 (48 Stat. 128; 12 U. S. C. 1461, et seq.); and title IV of the National Housing Act, approved June 27, 1934 (48 Stat. 1255; 12 U. S. C. 1724, et seq.), together with later amendments to those acts.

Organization.—The Board consists of three members, appointed by the President by and with the advice and consent of the Senate. Not more than two members may be members of the same political party. Members are appointed for *a* term of 4 years each.

Funds—Expenses of the Board are paid by assessments against the regional Federal Home Loan Banks and the Federal Savings and Loan Insurance Corporation, and charges against institutions examined by its Examining Division. All of these activities are self-supporting and do not require the appropriation of United States Treasury funds.

Federal Home Loan Bank System

Creation:—The Federal Home Loan Bank System was created by authority of the Federal Home Loan Bank Act, approved July 22, 1932 (see citations under Federal Home Loan Bank Board), to provide credit reserve for savings and home-financing institutions.

Organization.—In operation during 1964 were 12 regional Federal Home Loan Banks of this System, located in Boston, New York, Pittsburgh, Greensboro (N.C.), Cincinnati, Indianapolis, Chicago, Des Moines, Little Rock, Topeka, San Francisco, and Spokane (opened for business April 6, 1964). The management of 5 of the 12 Banks (Boston, Pittsburgh, Greensboro, San Francisco, and Spokane) is vested in a board of 12 directors, 4 appointed by the Federal Home Loan Bank Board to represent the public interest and 8 elected by the member institutions. Four Banks (Indianapolis, Des Moines, Little Rock, and Topeka) have 13 directors each—4 appointed and 9 elected; 3 banks (New York, Cincinnati, and Chicago) have 14 directors each—4 appointed and 10 elected. The directors of each Bank elect a president and other officers, subject to approval by the Bank Board.

Capital and Funds.—The capital stock of the district Federal Home Loan Banks is entirely owned by institutions which have been accepted into membership, each of which is required to purchase stock. As of December 31, 1964, stock owned by member institutions amounted to \$1,227,176,000. The Banks may obtain other loanable funds through the issuance of consolidated obligations, through deposits accepted from member institutions and from other Federal Home Loan Banks.

Eligible Institutions.—The types of institutions eligible to become members of the Federal Home Loan Banks are savings and loan, building and loan, and homestead associations, savings and cooperative banks, and insurance companies. Every Federal savings and loan association is required to become a member of its regional Federal Home Loan Bank, and to qualify for insurance

of accounts (see Federal Savings and Loan Insurance Corporation).

On December 31, 1964, there were 5,031 members in the System, having combined assets of \$122,457,000,000, located in the 50 States, Puerto Rico, Guam, and the District of Columbia. Through that date the Federal Home Loan Banks had advanced to these member institutions a total of about \$32,732,000,000 of which \$27,407,000,000 had been repaid, leaving outstanding a balance of \$5,325,000,000.

Power to Borrow.—Consolidated Federal Home Loan Bank obligations, which are the joint and several liabilities of the Banks, are issued by the Board in the form of notes or bonds, and without guaranty by the United States. Consolidated obligations amounting to \$4,369,000,000 were outstanding on December 31, 1964. In case of need the Secretary of the Treasury is authorized to purchase consolidated Federal Home Loan Bank obligations up to a billion dollars outstanding at any one time. No such purchases have been made.

Federal Savings and Loan Associations

These associations are provided for by section 5 of the Home Owners' Loan Act of 1933 (48 Stat. 132) as amended. They are chartered and supervised by the Federal Home Loan Bank Board, and may be either new institutions or converted from State-chartered institutions upon application. As of December 31, 1964, there were 1,981 Federal savings and loan associations, with combined assets of more than \$61,643,000,000.

Federal Savings and Loan Insurance Corporation

Creation.—The Federal Savings and Loan Insurance Corporation was created by title IV of the National

Housing Act (see citations under Federal Home Loan Bank Board), to insure the safety of savings in thrift and home-financing institutions.

Organization.—The operations of the Federal Savings and Loan Insurance Corporation come under the general direction and supervision of the Federal Home Loan Bank Board.

Functions.—The Corporation insures the safety of savings and credited earnings up to \$10,000 for each investor's account in an insured institution. All Federal savings and loan associations, and these State-chartered building and loan, savings and loan, and home-stead associations and cooperative banks which apply and are approved, are insured. On December 31, 1964, there were 4,463 insured institutions, with total assets of about \$114,652,000,000.

Default Procedure.—To prevent the default of an insured institution or restore it to normal operation, the Corporation may make loans to, purchase assets of, or make a financial contribution to such an institution. In the event of a default by any insured institution, payment of each insured account in such insured institution, which is surrendered and transferred to the Corporation, shall be made by the Corporation as soon as possible, either (1) by cash or (2) by making available to each insured member a transferred account in a new insured institution in the same community or in another insured institution in an amount equal to the insured account of such insured member.

Funds.—Income of the Corporation consists principally of premiums paid by insured institutions and interest earned on investments. All income above expenses

is transferred to reserves. Reserves and unallocated income, as of December 31, 1964, totaled \$1,252,000,000. The Corporation is authorized to obtain additional funds for insurance purposes from the United States Treasury not exceeding \$750,000,000 outstanding at any one time. This borrowing authority has never been exercised.

Retirement of Capital Stock.—The capital stock of the Corporation, originally issued in the amount of \$100,000,000 and formerly held by the United States Treasury, has now been completely retired. As provided by law, effective June 27, 1950, the Corporation retired at the end of each fiscal year an amount of its capital stock equal to 50 percent of its net income for the year.

Federal Savings and Loan Advisory Council

The Federal Savings and Loan Advisory Council is an independent statutory advisory body empowered to consult with the Federal Home Loan Bank Board in its administration of the Federal Home Loan Bank System, the Federal Savings and Loan Insurance Corporation, and the Federal Savings and Loan System. Establishment of the Council emphasized the public interest which is inherent in operations of the Board agencies and of the supervised savings and home financing institutions which serve many millions of savers, investors, and homeowners over the Nation. Meeting in Washington at least twice a year, the Council may initiate recommendations to the Board and request information from the Board with respect to matters within the jurisdiction of the Board.

The Council consists of 18 members—one elected for each of the 12 Federal Home Loan Bank Districts, and six appointed annually by the Federal Home Loan Bank

Board. The elected, members are generally chosen from the ranks of active savings and loan managers. The appointed members are chosen on the basis of leadership in business or the professions.

Approved.

John E. Horne,
Chairman.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH D. MULLENDER, JR.